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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 829

R. L. BRADFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals on petitioner's motion to reopen the dismissal of his appeal in 1950 (Pet. App. 9–11) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered January 20, 1958. A petition for rehearing was denied on February 5, 1958. The petition for a writ of certiorari was filed on March 4, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals, which had in 1950 dismissed petitioner's appeal from a judgment entered on a plea of guilty, was required to reopen the proceeding in 1958, after sentence had been served, because counsel had not been assigned to prosecute the appeal.

STATEMENT

In December 1949, during a trial for mail fraud in the United States District Court for the Southern District of New York, petitioner, who was represented by counsel, pleaded guilty to four counts charging mail fraud violations. He was sentenced to concurrent terms of imprisonment of one year and one day on counts 1 and 2, and to three years probation on counts 3 and 4 to commence upon expiration of his term of imprisonment. He filed a notice of appeal to the Court of Appeals on December 21, 1949. On January 20, 1950, petitioner filed in the Court of Appeals a motion for leave to proceed in forma pauperis, for an extension of time within which to docket the record on appeal, and for appointment of counsel. He alleged that the indictment did not charge an offense and that the mail fraud statute was unconstitutional. When the motion came up on the calendar, the United States attorney made an oral cross-motion for dismissal of the appeal. On January 31, 1950, the Court of Appeals entered an order stating that, upon consideration of petitioner's motion and the oral cross-motion, it is "Ordered that the appeal

herein be and it hereby is dismissed" (Pet. 3).[1] In this proceeding, the Court of Appeals has stated that the appeal was dismissed as frivolous.

In 1953, petitioner, through counsel, sought to have the dismissal of the appeal vacated, arguing that he had not received notice of the oral motion of the United States attorney. That application was denied and a petition for a writ of certiorari was denied by this Court. 347 U. S. 945 (No. 399 Misc., O. T. 1953).

Petitioner also made various collateral attacks upon the judgment. A petition for a writ of habeas corpus, and a motion under 28 U. S. C. 2255, brought after petitioner had served the imprisonment part of his sentence, were dismissed for lack of jurisdiction. 185 F. 2d 1021; 194 F. 2d 197. Subsequent to the decision of this Court in *United States* v. *Morgan*, 346 U. S. 502, petitioner was granted a hearing on an application for a writ of *coram nobis*. His contentions therein, which, *inter alia*, attacked the competency of court-appointed counsel, were found to be without merit. 122 F. Supp. 915, appeal dismissed for lack of prosecution. A second coram nobis petition was denied without a hearing, and the ruling of the court was affirmed on appeal. 238 F. 2d 395, certiorari denied, 352 U. S. 1002.

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[1] The record of the proceedings at that time and on a subsequent motion to vacate the order of dismissal is on file in this Court in No. 399 Misc., O. T. 1953.

The present proceeding was another application by petitioner to the Court of Appeals to vacate the 1950 dismissal of the appeal. Petitioner argued that, under the rulings of this Court in *Johnson* v. *United States,* 352 U. S. 565, and *Farley* v. *United States,* 354 U. S. 521, reopening was required since counsel had not been assigned to him. The Court of Appeals held that its order of dismissal was not within the purview of these cases since here the conviction rested upon a voluntary plea of guilty and the lack of merit of the appeal was determined solely from the face of the record.

ARGUMENT

There is no merit in petitioner's argument that the dismissal of his appeal in 1950 had to be reopened under the rulings of this Court in *Johnson* v. *United States,* 352 U. S. 565, and *Farley* v. *United States,* 354 U. S. 521. Petitioner did not seek counsel in the district court and did not apply to the Court of Appeals for appointment of an attorney until his time to docket the appeal had almost expired. He coupled that application with a motion for extension of time to docket the record. In the face of the utter frivolity of his contentions, which attacked a conviction resting on a voluntary plea of guilty during trial, the Court of Appeals was not required to grant him the grace of an extension of time and appoint an attorney to prosecute an untimely appeal. *A fortiori* it was not required to reopen the proceedings eight years later when petitioner's sentence had been fully served.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1958.

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